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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 98-204
Broadcast and Cable Equal Employment	)	
Opportunity Rules and Policies	)	
and	)	
Termination of the EEO Streamlining	)	MM Docket No. 96-16
Proceeding	)	

TO: The Commission

COMMENTS OF THE TEXAS ASSOCIATION OF BROADCASTERS

1. The Texas Association of Broadcasters ("TAB") hereby submits its Comments in response to the Notice of Proposed Rule Making, FCC 98-305, released November 20, 1998, in the above-captioned proceeding. [1/] The TAB also is joining in a set of Joint Comments being submitted herein on behalf of a number of state broadcasters associations [2/]; the instant comments are intended to reflect the TAB's concern about particular areas, and are intended to be supplemental to the Joint Comments in which the TAB is participating.

2. The TAB is a voluntary association, established almost 50 years ago, representing radio and television stations throughout the state of Texas. Texas, of course, is the largest of the lower 48 states, and includes two of the top 20 markets,

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[1/] The deadline for submitting comments in this proceeding was extended to March 1, 1999, by Order, FCC 99-326, released February 12, 1999.

[2/] Additionally, the TAB has previously provided comments on EEO-related matters in comments filed in, e.g., MM Docket No. 96-16 on July 11, 1996. All of those comments are incorporated herein by reference.

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three of the top 50 and seven of the top 100. But the vast majority of Texas broadcasters operate in medium and smaller markets. Demographically, Texas enjoys a rich ethnic diversity, with significant numbers of African-Americans, Hispanics and Asians in the general population and the work-force. Indeed, in many South Texas markets Hispanics constitute a statistical majority. The TAB thus has extensive experience in conducting business in a multi-ethnic environment.

3. Based on that experience, the TAB believes that the Commission's latest proposals are misdirected. Needless to say, the TAB does NOT condone or justify -- in any way, shape or form -- discrimination based on race, ethnicity or gender. This includes discrimination in the hiring and promotion of qualified individuals, male and female, of all races and ethnicities. In the TAB's experience and observation, there is no industry-wide discrimination problem in broadcasting. [3/]

4. To the contrary, as the TAB has previously demonstrated, broadcasters have engaged -- and continue to engage -- in substantial efforts to broaden the ethnic range of their employment base. The TAB itself has maintained multiple recruitment resources -- including the publication of job announcements, presentation of job fairs, maintenance of a job

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[3/] The TAB recognizes that it would be naive to assert that there is no discrimination anywhere in the industry. But the TAB is not aware of any broadcasters who engage in discrimination. And, as discussed in the text, above, if any such broadcasters were to be identified, they would be subject to penalties before the Equal Employment Opportunity Commission ("EEOC") and/or the state courts and/or the federal courts and/or one or more state agencies.

bank, creation of useful databases of referral sources, featuring of employment opportunities on the TAB's web site, among others. TAB's on-line job listings are free to all job seekers and member stations. Internet-based job postings are updated each week, with nearly 2,500 visits daily. In addition, TAB participates in approximately 10 job fairs annually working with organizations such as the Houston and Austin Area Urban Leagues and the National Association of Black, Asian, Hispanic and Native American Journalists. TAB places all interested applicants from these job fairs in its on-line job bank, allowing job seekers unlimited exposure to broadcast stations and firms across the world. See also, e.g., Attachment B to TAB's Comments in MM Docket No. 96-16 (filed July 11, 1996). Importantly, the TAB has undertaken all these (and more) activities NOT because the Commission required it, but rather because it was the right thing to do. The TAB thus does not believe that any Commission-imposed EEO rules are necessary to achieve broad availability of information concerning opportunities in the broadcasting industry.

5. Further, the TAB does not believe that the Commission itself is the appropriate agency to combat whatever discriminatory practices may still exist. And even if the Commission were the appropriate agency, the most recent proposals would not begin to achieve their supposed purpose.

6. As an initial matter, it is important to recognize that there exist at least three non-FCC fora for the adjudication of complaints of discrimination: the federal EEOC, various state

agencies, and the state and federal courts. Each of those non-FCC fora is able to afford complete relief to individual victims of discrimination, and each also is able to reach beyond individual cases to craft remedies against broader, systemic discrimination. Moreover, anti-discrimination efforts by any of those non-FCC fora appear to enjoy substantial constitutional support. By contrast, the Commission does not appear to have the constitutional authority to engage in race-based decision-making and, even if it did, the Commission is incapable of providing relief to the victims of discrimination, either individually or as a group.

7. With respect to the constitutionality of the Commission's equal employment opportunity efforts, the courts have clearly indicated that the Commission's previous efforts were unconstitutional. See Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir.), reh. denied, 154 F.3d 487 (D.C. Cir.), reh. en banc denied, 154 F.3d 494 (D.C. Cir. 1998). The Commission's latest proposals are merely thinly-veiled reiterations of that previous, constitutionally infirm, approach: the Commission would still require broadcasters to maintain a wide variety of race-sensitive records designed to establish that the broadcasters have not engaged in discrimination.

8. While the Commission may claim that its proposals impose no real race-based burden on broadcasters -- such as a mandated quota in the guise of hiring guidelines -- the fact is that even the new proposals would require broadcasters to track racial and ethnic hiring and promotion (as the previous,

unconstitutional rules did) and to "address any difficulties encountered in implementing" non-discriminatory recruitment, hiring and promotion practices. See NPRM, Appendix A, proposed Section 73.2080(c)(2). Does the Commission really believe that this is substantively different from its previous, unconstitutional regime of broadcaster self-analysis? What, after all, does the Commission mean by "any difficulties", and how are broadcasters supposed to "address" those "difficulties"?

9. Moreover, if actual discrimination is the Commission's real target here, the EEOC and courts provide much more effective mechanisms for addressing, and relieving, that problem. The Commission is not in a position to enjoin particular behavior or award damages for past misconduct in order to make whole those who have suffered from unlawful practices. Nor, for that matter, is the Commission institutionally designed to assess, or experienced in assessing, complaints of actual discrimination. For the most part, the Commission's historical enforcement of its own EEO rules has involved little more than comparisons of population or workforce statistics with the employment statistics of individual stations. And the target stations generally happen to have been singled out not by any actual victim of discrimination, but by one or another "bounty hunter" group advancing its own agenda, rather than the interests of any claimed victim.

10. This last point presents further support for the notion that the Commission should abandon its historical EEO approach. That approach has primarily served not to prevent discrimination,

but rather to give rise to "bounty hunters" who, while claiming to be acting in the public interest, in fact are using the Commission to advance their own private interest. The TAB called the Commission's attention to these bounty hunters in its July, 1996 Comments in MM Docket No. 96-16. Essentially, these bounty hunters utilize the threat of continued litigation to justify payments and other consideration to themselves by broadcasters. The ultimate beneficiaries of the bounty hunters' activities are the bounty hunters themselves.

11. The Commission's EEO rules have encouraged the growth of these questionable activities. In the Commission's regulatory environment, a licensee -- even a completely innocent licensee -- has nothing to gain and much to lose by fighting even a bogus EEO complaint from a bounty hunter. The licensee risks a fine or forfeiture (or, in a truly worst-case scenario, a license), if found guilty. And even if the licensee is completely innocent and able to prove it -- a distinctly distasteful twist on the "innocent until proven guilty" standard applicable elsewhere in the U.S. system of justice -- the licensee will still incur substantial legal fees along the way, not to mention the "cloud" over the license during the pendency of the bounty hunters' allegations. By contrast, there is virtually no disincentive to discourage bounty hunters, who are not Commission licensees and thus are not subject to any effective sanction by the Commission.

12. Whatever the Commission does, it should work to eliminate, or at least discourage, these race-based opportunistic bounty hunters, in whose hands the Commission's EEO programs,

however well-intentioned, become little more than a weapon to be inflicted on all broadcasters. [4/]

13. The TAB notes with concern the fact that, notwithstanding the Court's decision in Lutheran Church, supra, (and its antecedent, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)), the Commission still appears to be intent upon engaging in divisive race-based regulation. This is apparent not only in the NPRM herein, but also in the Commission's decision in 1998 Biennial Review - Streamlining of Mass Media Applications, Rules and Processes, FCC 98-281, released November 25, 1998 ("Ownership Report Revision"). In that decision, the Commission decided, apparently sua sponte, to require the reporting of the race or ethnicity of broadcast owners -- a reporting requirement not previously imposed by the Commission. Presumably, this new reporting requirement arises from some general interest in promoting "diversity" in broadcasting -- the same general interest which the Commission has previously cited in support of its EEO rules. But as the U.S. Court of Appeals for the Fifth Circuit said, "the use of race to achieve diversity undercuts the ultimate goal of the Fourteenth Amendment: the end of racially motivated state action". Hopwood v. Texas, 78 F.3d 932, 947-48 (5th Cir. 196).

[4/] To that end, the TAB urges that, if the Commission ultimately decides to require broadcasters to maintain EEO data for self-evaluation purposes, such data should be deemed confidential and unavailable to the public at large (unless the licensee elects to disclose the data). The Commission's records already demonstrate that bounty hunters have sought to avail themselves of data which demonstrate no discrimination at all.

14. The Commission's continued efforts to engage in race-based decisionmaking are troublesome because such decisionmaking inevitably tends to divide rather than unite. Where a federal agency requires its regulatees to maintain detailed race-based records (whether relating to employment, ownership, or other matters), the agency is requiring those regulatees to perceive the world in purely racial or ethnic terms. Such a manner of perception is precisely contrary to the goal of the civil rights movement from which such regulations supposedly derive their inspiration. [5/]

15. This problem is highlighted by the Commission's own historical difficulty in defining the various racial/ethnic categories about which broadcasters must report. In the past, the Commission has used the term "minority" to refer generally to individuals falling into one of the following categories: "Black, Hispanic, Native American, Alaska Native, Asian and Pacific Islander". Presumably, the Commission intends to use the same categories in implementing its proposed EEO rule, even though the

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[5/] For example, Martin Luther King looked forward to the day when black children could be judged on the content of their character, not on the color of their skin. As Thurgood Marshall argued before the Supreme Court in Brown v. Board of Education, "[governmental classifications] based upon race and color alone . . . [are] patently the epitome of that arbitrariness and capriciousness constitutionally impermissive under our system of government. A racial criterion is a constitutional irrelevance, and is not saved from condemnation even though dictated by a sincere desire to avoid the possibility of violence or racial friction." Appellants' Brief in *Brown*, filed September 23, 1952 at 6-7 (citations omitted). But if race/ethnicity is an "irrelevance" in the assessment of individuals, forcing a whole industry to analyze itself in terms of race/ethnicity seems completely counter-intuitive.

NPRM and proposed rules themselves are curiously silent about just what the term "minority" might mean. [6/]

16. But the Commission itself tacitly acknowledged in Ownership Report Revision that its generic racial/ethnic standards for "minority" needed elaboration. See Ownership Report Revision at ¶104. Accordingly, the Commission claimed to adopt, at least for Ownership Report purposes, the definitions of "minority" which had been utilized in the instructions to the former Annual Employment Report Form (FCC Form 395-B). But the new definitions appearing in the instructions to the Annual Ownership Report are somewhat different from those which previously appeared in the Annual Employment Report Form instructions. [7/] How the Commission came to adopt these new

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[6/] As far as the TAB can tell, the closest the Commission comes to defining "minority" in the NPRM is in Footnote 124 to the Initial Regulatory Flexibility Analysis included as Appendix D to the NPRM, where the Commission refers to "Black, Hispanic, Asian and Native American". While it is not clear that this footnote reference in an appendix was intended to provide the governing definition for the term "minority" -- a term whose definition is obviously crucial to the proposed EEO rules -- no other definition of that term is to be found in the NPRM.

[7/] For example, the new definition of "Asian" includes any person "having origins in the original peoples of the Far East, Southeast Asia, or the Indian Subcontinent", which appears to exclude a substantial portion of that which is geographically identified as "Asia". Similarly, "African-American" is defined as a person "having origins in any of the black racial groups of Africa". The term "black racial groups of Africa" is not otherwise defined, although it presumably cannot include anyone from "North Africa", since such persons are considered (under the Commission's definition) to be "White". But note that the term "North Africa" is not defined by the Commission, either, geographically or otherwise. Other definitional lacunae involve the terms "having origins in" -- how does one know whether one has sufficient "origins in" a particular race to qualify -- and "the original peoples" of one geographical area or another -- who

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definitions is not disclosed in either the NPRM or Ownership Report Revision.

17. But the Commission's own obvious difficulties with defining relevant racial and ethnic categories -- and the questions which those categories obviously pose -- demonstrate the dangers of governmental race-based regulation, regardless of how benign that regulation may appear on the surface. By seeking to divide the population into racial and ethnic categories, the Commission merely heightens the governmental significance of traits which are, or should be, governmentally irrelevant. Accordingly, the TAB respectfully suggests that the Commission should re-think its continuing efforts to engage in race-based regulation at any level.

Respectfully submitted,

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[7/](...continued)
are they, and how can we find out? And how, in any event, did the Commission conclude that diversity might be advanced more by someone with "origins" in certain geographical areas (e.g., the Indian Subcontinent") but not in others (e.g., "the Middle East")?